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No. 93-349

In the Supreme Court of the United States

OCTOBER TERM, 1993

EDWIN W. MUGFORD, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

CYNTHIA A. YOUNG
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court properly admitted into evidence nine customer loan applications and related automobile sales documents.

2. Whether the admission of the customer loan applications violated petitioner's rights under the Confrontation Clause.

3. Whether the evidence was sufficient to support petitioner's convictions for conspiracy and fraud.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. vii) is unreported, but the judgment is noted at 995 F.2d 236 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1993. Pet. App. vii. A petition for rehearing was denied on August 6, 1993. Pet. App. viii-ix. The petition for a writ of certiorari was filed on September 1, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conspiracy to defraud a federally insured financial institution, in violation of 18 U.S.C. 371; one count of bank fraud, in violation of 18 U.S.C. 1344; one count of mail fraud, in violation of 18 U.S.C. 1341; and one count of making false statements in a loan application, in violation of 18 U.S.C. 1014. The court suspended petitioner's sentence and placed him on probation for three years. The court of appeals affirmed. Pet. App. vii.

1. Petitioner was a salesman at Royal Buick, Inc., a car dealership in Tampa, Florida, from January 1985 through the summer of 1986. In early 1985, two managers at Royal Buick created an advertising program targeted at persons with bad credit or no credit history. Royal Buick's advertisements suggested that potential customers call "Betty Moses" or "Frank Moses," fictional names chosen by the two managers because they would not intimidate the targeted customers. Gov't C.A. Br. 6.

As a result of those advertisements, many lower- and middle-income customers with bad credit went to Royal Buick to purchase used cars. The Royal Buick salesmen treated the "Betty Moses" customers differently from other customers: the salesmen usually took a Betty Moses customer's credit information over the telephone and then filled out the customer's credit applications themselves, falsifying the credit history, banking, employment, housing, and other information in order to make the customer appear more stable, and to give the customer a credit

history that could not be verified. A Betty Moses customer who came into the dealership was asked to sign a blank credit application that one of the salesmen would complete, again with false information, after the customer left. Once the application was completed, Royal Buick would submit it to Florida National Bank for approval. If the bank approved the loan application, the salesman would call the customer to tell him he had been approved for a certain car and on specific terms. Gov't C.A. Br. 7-8.

The Betty Moses customers received different treatment in other ways as well. Because the Betty Moses customers could not object to the terms of the sale, the salesmen sold them cars at prices above the cars' value, added extended warranties and life and disability insurance contracts without the customers' knowledge, and charged interest rates as high as the State of Florida allowed and far above the bank's rates. Many of the cars, however, had mechanical problems. Gov't C.A. Br. 14-17.

Royal Buick salesmen were taught how to falsify credit applications during their regular morning sales meetings, in individual meetings with Royal Buick managers, and by watching the managers rewrite applications. The salesmen were told to give customers telephone numbers, checking accounts, credit accounts, and part-time jobs to ensure that Florida National Bank would approve the loan applications.[1] The falsification of the credit applications was a general practice among Royal Buick employees.

[1] Kathleen German, a loan officer at Florida National Bank and co-defendant in this case, handled the Royal Buick loans and was aware of the falsification of loan applications. Gov't C.A. Br. 20-22.

Like the other salesmen, petitioner added extra jobs or extra income to credit applications, and he advised another salesman that, when completing an application for a customer who had no credit, the salesman should "give them some credit or give them a Visa or whatever." Gov't C.A. Br. 28; *id.* at 8-13.

In addition to defrauding Florida National Bank through the submission of false credit applications, Royal Buick salesmen used an internal rebate scheme to make the bank believe that the customers had made down payments on their cars. Royal Buick raised the price of the car reported to the bank, issued a "rebate" check to the customer that the customer then signed back to Royal Buick, and reported the receipt of those funds as a down payment. Another scheme employed by Royal Buick involved the sale of a new car to a customer who wanted to trade in an old car worth less than the amount owed on it. Since the bank would only lend a certain amount over the price of a new car, Royal Buick bought and resold the new car so that it became a used car and the bank would make the higher used-car loan. Gov't C.A. Br. 17-19.

Royal Buick's "Betty Moses" promotion doubled its sales of used cars. As a result, for the one and one-half years of the scheme, all of Royal Buick's employees profited. Salesmen were paid by the number of cars they sold and a percentage of the profit, and promotions were given to the salesmen who sold the most cars. In the end, however, most of the Betty Moses cars were repossessed when the customers could not make the sizable payments. Royal Buick abandoned the Betty Moses promotion in the summer of 1986, when Kathleen German, the Florida National Bank loan officer who had handled Royal Buick's

loans, was removed from her position. Gov't C.A. Br. 19-22.

2. Petitioner, Royal Buick, and 16 other individuals were indicted on charges of conspiring to defraud Florida National Bank and of committing substantive fraud offenses. At trial, the government offered into evidence Royal Buick's sales files, each of which contained the customer's loan application, a salesman's worksheet on that customer, an application and agreement for insurance, a cashout sheet, a check list, an extended warranty agreement, an odometer mileage statement (part of the state application for transfer of title), an automobile repossession notice, and other documents. Gov't C.A. Br. 29-30, 33-34.

Former Royal Buick salesman David Wilkerson, who worked at Royal Buick from 1983 to 1988, testified that he was familiar with the files, that the documents were kept in the regular course of the company's business, that Royal Buick relied on the documents, and that they had been prepared by persons with the information necessary to complete the documents. 17 Tr. 165-171. Defense counsel objected to the introduction of the records on two grounds: first, that Wilkerson was not qualified to introduce the Royal Buick records because he did not have the requisite knowledge or position in Royal Buick, and second, that documents relating to sales not specifically enumerated in the indictment should not be admitted under Fed. R. Evid. 404(b). 17 Tr. 169-171. The court overruled the objections, finding the documents admissible under Fed. R. Evid. 803(6), 901(b)(4), and 1003, and, in light of the conspiracy charge, the court also found the documents properly admissible under Fed. R. Evid. 404(b). 17 Tr. 171.

The jury convicted petitioner on the conspiracy count and three substantive fraud counts. Pet. App. x-xi. The court of appeals affirmed without opinion. *Id.* at vii.

ARGUMENT

1. Petitioner contends (Pet. 6-42) that the district court erred in admitting into evidence nine loan applications on which he was identified as the salesman.[2] He claims that the records did not have the requisite guarantee of trustworthiness (Pet. 6-7, 12-33), and that their admission as business records was contrary to decisions of six other courts of appeals (Pet. 29-30 & n.3). Because petitioner failed to object to the admission of the documents under the business-records exception, his claim with respect to that point is reviewable only for plain error. See Fed. R. Crim. P. 52(b); *United States* v. *Young*, 470 U.S. 1, 15-16 (1985). The plain error doctrine encompasses only "particularly egregious" errors that result in a "miscarriage of justice," *United States* v. *Olano*, 113 S. Ct. 1770, 1779 (1993); *United States* v. *Frady*, 456 U.S. 152, 163 & n.14 (1982), and petitioner fails to make such a showing. In any event, petitioner can demonstrate no error in the admission of the documents.

a. As the government argued in the court of appeals, the customers' loan applications and related

[2] The government introduced 11 credit applications that listed petitioner as the salesman. The evidence established that the application for Hedrick Burns had been completed by another salesman, however, and the jury acquitted petitioner on the substantive count associated with the loan application of customer Jeffrey Mosley. Gov't C.A. Br. 29. Thus, there are only nine loan applications at issue here.

documents were properly admitted without regard to the business records exception, because they were not offered as hearsay, *i.e.*, out of court statements used to establish the truth of the matter asserted. In fact, as the testimony established, the loan applications were replete with false information regarding the customers' residences, income, employment, and credit, and it was that falsity that was relevant to the violations in this case. Gov't C.A. Br. 103-107.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Statements admitted to prove the falsity of the matter asserted are not regulated by the hearsay rule. *Anderson* v. *United States*, 417 U.S. 211, 219-220 (1974); *United States* v. *Adkins*, 741 F.2d 744, 746 (5th Cir. 1984), cert. denied, 471 U.S. 1053 (1985); see *United States* v. *Sliker*, 751 F.2d 477, 489 (2d Cir. 1984), certs. denied, 470 U.S. 1058 and 471 U.S. 1137 (1985); *United States* v. *Gibson*, 690 F.2d 697, 700 (9th Cir. 1982), cert. denied, 460 U.S. 1046 (1983); see also *United States* v. *Hershenow*, 680 F.2d 847, 861 n.12 (1st Cir. 1982). Such statements, or the documents in which they appear, are admitted to prove that the statements were made, and to establish a foundation for later showing, through other admissible evidence, that the statements were false. *Adkins*, 741 F.2d at 746; *United States* v. *Clark*, 737 F.2d 679, 681 (7th Cir. 1984); *Sliker*, 751 F.2d at 489; *Gibson*, 690 F.2d at 700 n.1; *Hershenow*, 680 F.2d at 861 n.12; *United States* v. *Lieberman*, 637 F.2d 95, 101 (2d Cir. 1980). The loan applications in this case were admissible to prove that Royal Buick and its customers completed loan applications and to establish

the existence and nature of the scheme to defraud Florida National Bank; other evidence made possible the inference that the information in the loan applications was false and that the Royal Buick employees had supplied that false information.[3] See *Adkins*, 741 F.2d at 746; *Lieberman*, 637 F.2d at 101.

The district court admitted all of the Royal Buick sales files, including the loan applications, pursuant to the business records exception to the hearsay rule, Fed. R. Evid. 803(6). Nevertheless, a trial court's decision to admit evidence will not be reversed where there exists any proper basis for the admission of the evidence. See, *e.g.*, *Onujiogu* v. *United States*, 817 F.2d 3, 5 (1st Cir. 1987); *United States* v. *Moore*, 748 F.2d 246, 248 (5th Cir. 1984); *United States* v. *Evans*, 572 F.2d 455, 488 (5th Cir.), cert. denied, 439 U.S. 870 (1978). Because the loan applications were admissible for the non-hearsay purpose of showing that they were false, their admission into evidence is not a basis for reversal.

b. Contrary to petitioner's contention (Pet. 25-32), this case does not create a circuit conflict with

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[3] Petitioner contends (Pet. 19-25) that the loan applications were hearsay because they were offered to prove that petitioner was the salesman on those sales, as stated on the applications, and that he falsified the documents. The loan applications were offered to establish that they were completed; other evidence, such as the related documents in the sales files, proved that petitioner was the salesman on those sales. The testimony of other Royal Buick salesmen demonstrated that it was the regular practice of Royal Buick employees to falsify the loan applications and that petitioner knew about and participated in such falsification. From that evidence, the jury reasonably could infer that petitioner had falsified the loan applications at issue.

respect to the admissibility of business records containing double hearsay or otherwise failing to satisfy the requirements of the Rule 803(6) exception. Petitioner is correct that other courts of appeals have held that documents are not admissible under the business records exception if any participant in the production of the record is not acting within the regular course of his business's activity, and that the business records exception does not apply to an entire record when some of the information in it is based on statements of persons not acting in the regular course of that business. See, *e.g.*, *Wilson* v. *Zapata Off-Shore Co.*, 939 F.2d 260, 271-272 (5th Cir. 1991); *United States* v. *Snyder*, 787 F.2d 1429, 1434 (10th Cir.), cert. denied, 479 U.S. 836 (1986); *United States* v. *Pazsint*, 703 F.2d 420, 424-425 (9th Cir. 1983); *United States* v. *Baker*, 693 F.2d 183, 188 (D.C. Cir. 1982); *Lieberman*, 637 F.2d at 100-101; see also *Datamatic Services, Inc.* v. *United States*, 909 F.2d 1029, 1033 (7th Cir. 1990). But the court's decision to admit the loan applications in this case does not conflict with that principle, because the loan applications were properly admissible as non-hearsay. It was therefore not necessary for them to satisfy the requirements of Fed. R. Evid. 803(6).

c. The remaining documents in the Royal Buick sales files were properly admissible under the business records exception to the hearsay rule, and petitioner does not contend that they included double hearsay or otherwise failed to meet the requirements of Rule 803(6). The other documents included salesmen's worksheets, warranty agreements, insurance records, applications for titles, and other documents of "everyday activity." The testimony of David Wilk-

erson and other Royal Buick salesmen established that the documents were made at the time of the sales and that the documents were maintained in the regular course of business by Royal Buick employees who had a duty to record the transactions accurately. The district court reasonably determined that those records satisfied the requirements of Rule 803(6), including trustworthiness, and petitioner and his co-defendants offered no evidence to the contrary. See *United States* v. *Patterson*, 644 F.2d 890, 900-901 (1st Cir. 1981) (determination of trustworthiness is within trial court's discretion); see also *United States* v. *Hathaway*, 798 F.2d 902, 906 (6th Cir. 1986) (evidentiary rulings are within trial court's discretion).

To the extent that petitioner is renewing his claim (Pet. 32-37) that Wilkerson was not qualified to introduce the Royal Buick files and that the documents were not properly authenticated, his claims must fail. Wilkerson testified that he worked as a salesman at Royal Buick from 1983 to 1988, that the records were kept in the regular course of business, that he was familiar with the files generally and with those relating to his own sales specifically, and that he could identify the records as Royal Buick's business records from the appearance of the files. 17 Tr. 165-171. A witness "need not have been the preparer of the record, nor must he personally attest to the accuracy of the information contained in the records" in order to be qualified to introduce business records into evidence. *Wilson* v. *Zapata Off-Shore Co.*, 939 F.2d at 272 (emphasis and internal quotation marks deleted); see *Hathaway*, 798 F.2d at 906 (a witness is qualified to introduce records if he has knowledge of the regular practices of the business); *United States*

v. *Moore*, 791 F.2d 566, 574-575 (7th Cir. 1986) ("qualified witness" broadly interpreted as someone who understands the system).[4]

Moreover, Wilkerson's testimony sufficiently authenticated the business records. Authentication may be established by, *inter alia*, "distinctive characteristics" such as "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Fed. R. Evid. 901(b)(4). Wilkerson testified that he recognized the files because they included records from his own sales, and, generally, from the files' "appearance" —*i.e.*, from items in the files such as the names of customers and "everyday activity, like buyer's orders, credit statements, and things like that." 17 Tr. 170-171. That was sufficient authentication. See *Sliker*, 751 F.2d at 488.

2. Petitioner also contends (Pet. 42-55) that the admission of the loan applications violated his right to confront the witnesses against him under the Confrontation Clause of the Sixth Amendment. The loan applications, however, do not raise Confrontation Clause issues because they were not used for the hearsay purpose of proving the truth of their

[4] Petitioner's reliance (Pet. 34) on *United States* v. *Porter*, 821 F.2d 968, 977 (4th Cir. 1987), cert. denied, 485 U.S. 934 (1988), is misplaced. In *Porter*, the court held that the company's security officer was not qualified to introduce the company's personnel records because he did not work in the personnel department, did not know the company's record-keeping requirements, and could testify only that hiring cards were used. *Ibid.* Here, in contrast, Wilkerson was familiar with the records and record-keeping requirements because he was required to prepare some of the records and he worked with the files in the regular course of his employment.

contents. The admission of out-of-court statements for a purpose other than to prove the truth of the matter asserted "raises no Confrontation Clause concerns." *Tennessee* v. *Street*, 471 U.S. 409, 414 (1985) (holding that when an out-of-court confession is admitted for purposes other than to prove the truth of the confession, there is no right to confront the person who confessed); *Hathaway*, 798 F.2d at 905 (when "statements are offered to prove the falsity of the matter asserted, there is no need to assess the credibility of the declarant"). Petitioner had an opportunity to confront the persons who sponsored the admission of the loan applications, and that is all the Confrontation Clause required. *Tennessee* v. *Street*, *supra*.[5]

Nor were petitioner's confrontation rights violated with respect to those documents properly admitted as business records under Rule 803(6). This Court has held that "firmly rooted" exceptions to the hearsay rule carry sufficient indicia of reliability to satisfy reliability concerns under the Confrontation Clause. *White* v. *Illinois*, 112 S. Ct. 736, 742-743 & n.8 (1992); *Bourjaily* v. *United States*, 483 U.S. 171, 182-184 (1987); *Ohio* v. *Roberts*, 448 U.S. 56, 65-66 (1980). The business records exception, like the exceptions for statements made for purposes of medical diagnosis or

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[5] Petitioner also contends (Pet. 44-45) that the admission of the loan applications lowered the government's burden of proof because the admission told the jury that the customer was not the source of the false information and that each customer would deny that he provided the false information. Both of these conclusions were valid inferences about the documents based upon other evidence offered by the case; neither inference resulted from the mere admission of the loan applications.

treatment, and for spontaneous declarations, see *White* v. *Illinois*, 112 S. Ct. at 742 n.8, is such a firmly rooted exception. See *United States* v. *Baker*, 855 F.2d 1353, 1360 (8th Cir. 1988), cert. denied, 490 U.S. 1069 (1989); *United States* v. *Miller*, 830 F.2d 1073, 1077 (9th Cir. 1987), cert. denied, 485 U.S. 1033 (1988); see also *Ohio* v. *Roberts*, 448 U.S. at 66 n.8. Once a statement qualifies for admission under Rule 803(6), its reliability has been sufficiently established for Confrontation Clause purposes, and "adversarial testing can be expected to add little to its reliability." *White* v. *Illinois*, 112 S. Ct. at 743.

3. Petitioner renews his claim (Pet. 55-63) that the evidence was insufficient to sustain his convictions for conspiracy and fraud. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979); *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). That standard was met here.

a. There was ample evidence to establish a conspiracy in which petitioner participated. Several former Royal Buick salesmen testified that petitioner was aware of the fraudulent loan applications and "Betty Moses" car purchases, and that he participated in the illegal activity. Fellow salesman Wilkerson testified that he saw petitioner add an extra job or extra income to a credit statement. Former salesman Joseph Scarbrough testified that after he told petitioner that a customer had no credit and thus would be unable to qualify for a loan, petitioner suggested that Scarbrough "give [the customer] some credit or give them a Visa or whatever." Gov't C.A. Br. 28.

Wilkerson also testified that another Royal Buick employee commented that petitioner's profit on one "45-day rental"—*i.e.*, a car sale in which the customer would likely make only one or two payments before repossession—"was probably the highest dollar amount of profit that Royal Buick had ever made off of one customer in regard to financing." *Ibid.*; *id.* at 28-29, 59-60.

In addition, the government also entered into evidence nine car loan applications, all of which contained false credit information on the customer, were completed in the same handwriting, and identified petitioner as the salesman.[6] Those applications were included in the customers' files, which also contained invoices for the cars with petitioner's name, other documents identifying petitioner as the salesman, and at least one document bearing petitioner's signature, such as the odometer mileage statement (attached to the state application for transfer of title), or an insurance agreement. Each file also included a document showing that the automobile had been repossessed. Gov't C.A. Br. 29-30, 60-62. Based on that

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[6] Petitioner was not listed on one of the applications as the salesman; the handwriting on that application is identical to the handwriting on the other nine, however, and other documents in that customer's file include petitioner's name and signature. Gov't C.A. Br. 29. Petitioner's claim (Pet. 58-60) that the evidence is insufficient because no one identified his handwriting and thus it is only his name on the application that ties him into the conspiracy is without merit. There was sufficient evidence presented by other witnesses and by the other documents admitted into evidence from which a jury could reasonably infer that petitioner was in fact the salesman in those nine sales, and that he falsified the information on the loan applications.

evidence, it was reasonable for the jury to find that petitioner was part of a conspiracy to defraud Florida National Bank.

b. There was also sufficient evidence to support petitioner's convictions on the substantive fraud counts. Petitioner was convicted of bank fraud, in violation of 18 U.S.C. 1344, in connection with the loan application of customer Shelby Pryor in Count 10. That application and other sales documents in Royal Buick's file identify petitioner as the salesman; two documents include petitioner's signature. The loan application contains false statements about Pryor's occupation, salary, and bank account, and it shows a $1,000 cash down payment that was, in fact, a rebate to Royal-Buick. Gov't C.A. Br. 30-31, 62. That evidence—the information about the false cash down payment, in particular[7]—supports petitioner's conviction for falsifying Pryor's loan application and causing it to be submitted to Florida National Bank as part of the scheme to defraud the bank.

There was also sufficient evidence to sustain petitioner's conviction on Count 19 for mail fraud, in violation of 18 U.S.C. 1341, in connection with the loan application of customer Samuel Caperton and the mailing of Caperton's automobile title. Caperton's loan application falsely states that he had an account at Barnett Bank in 1986, and that he made a $1,000 cash down payment for his car. The $1,000 was, in reality, a rebate to Royal Buick. Caperton's loan

[7] The information about the false cash down payment could only have been added by a Royal Buick employee, contrary to petitioner's claim (Pet. 6-7, 21-24, 34-37) that there was insufficient evidence to convict him because the customers could have provided the false information on the loan applications.

application and the sales worksheet and other documents in his Royal Buick file identify petitioner as the salesman, and three documents in that file contain petitioner's signature. That, in conjunction with evidence showing that automobile titles were mailed between the Department of Motor Vehicles and Florida National Bank in the regular course of business, was sufficient. Gov't C.A. Br. 31, 40-41, 62-63.

Finally, petitioner was convicted of making a false statement in the loan application of customer Tracey Kenty (Count 49) and causing the application to be submitted to Florida National Bank in order to induce the bank to authorize a loan for Kenty, in violation of 18 U.S.C. 1014. Kenty's loan application falsely states that Kenty had an account at Sun Bank; another credit application Kenty made a few months earlier does not list the Sun Bank account. In addition, the loan application and six other Royal Buick documents identify petitioner as the salesman, and two documents contain petitioner's signature. That evidence was sufficient to sustain petitioner's conviction for making a false statement in Kenty's loan application. Gov't C.A. Br. 31, 63-64.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

CYNTHIA A. YOUNG
Attorney

DECEMBER 1993